



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 308 of 2009

MARY WAIRIMU KUBAI 1ST PLAINTIFF

JULIUS KAGOIYA KUBAI 2ND PLAINTIFF

VERSUS

VIJAY MORJARIA 1ST DEFENDANT

VIJAY MORJARIA 1ST DEFENDANT

CHIEF LAND REGISTRAR OF TITLES 2ND DEFENDANT

MOHAMED AHMED MOHAMED 3RD DEFENDANT

CHRISTINE MUMBI MWAI 4TH DEFENDANT

THOMAS JOSEPH OMONDI YIEKE 5TH DEFENDANT

DAVID MUCHEMI KIAMBI 6TH DEFENDANT

KENNETH CHANDARUA MUNENE 7TH DEFENDANT

JANE WANJIRU CHEGE 8TH DEFENDANT

SALLEPU MONLET 9TH DEFENDANT

EDWIN SHITSUKANE 10TH DEFENDANT

RUKENYA HUSSEIN ABDERAHMAN 11TH DEFENDANT

THOMAS NYABERA OMANGA 12TH DEFENDANT

ANTONY MULISA 13TH DEFENDANT

NIC BANK LIMITED 14TH DEFENDANT

DOMNIC MUKUI KIMATTA 15TH DEFENDANT

PERGOLLA LIMITED 16TH DEFENDANT

RULING

The 3rd, 4th to 11th and 13th, 12th and 16th defendants filed the following chamber summons under order 25 rules 1,2,5 (1) and 6 of the Civil procedure Rules seeking for an order that the plaintiffs do furnish security for costs in the following application.

3rd defendant: Chamber summons dated 24.4.09 Ksh.8,700,000.00.

4th to 11th defendant: Chamber summons dated 12.5.09 Ksh.8,700,000.00

12th defendant: Chamber summons dated 11.5.09 Ksh. 324,858.00

16th defendant: Chamber summons dated 12.5.09 Ksh.8,700,000.00

These applications are based on the grounds inter alia that the suit against the defendants has no reasonable prospects of success on the grounds that there is no written authority of the second plaintiff authorizing the 1st plaintiff to plead for him as provided for under order 1 rule 12 of the Civil Procedure Rules. The suit is also defective because the 2nd plaintiff has not sworn a verifying affidavit in accordance with the mandatory requirements order 7 rule 12. The suit is also fatally defective as against the 2nd defendants for failing to give the mandatory 30 days statutory notice of intention to institute proceedings in accordance with section 13 (a) of the Government proceedings act. The plaintiffs were also faulted for failure to disclose previous proceedings in **Nakuru HCCC NO. 32 OF 1998 Vijay Morjaria versus Julius Kagoiya and Mary Wairimu Kubai** which suit related to the same suit property. The suit property was transferred on 13th November 1998 and the Limitation period for fraud is 6 years. Any suit based on fraud ought to have been filed by 13th November 2004. The suit property is not subject of the Land Control Board as the user was changed from Agricultural to residential in 1998. The defendants have been exposed to colossal costs in defending this suit by the plaintiff's who reside in the United States of America and have no known assets in Kenya therefore the defendants are likely to suffer loss on account of this suit.

This application is supported by the affidavit of **Jane Wanjiru Chege** on behalf of the 4th, 5th 6th, 7th, 9th, 10th, 11th and 13th defendants. The matters deponed to in the supporting affidavit also show how the costs sought have been worked out. The value of the suit premises is about 300 million and instruction fees calculated under schedule 6 of the Advocates Remuneration Order would amount to about 8.7 million. The grounds in support of the other application are more or less similar to the above grounds so are the matters deponed in the supporting affidavit. This grounds were further expounded by the submissions by counsel for the applicant. The security for costs has been used as a method for ensuring that a plaintiff is capable of meeting out the costs in the events the suit is dismissed or the courts makes an order in favour of the defendant. The suit premises in this case is registered under the Registration of Titles Act and according to the provisions of section 23 of the RTA the certificate of title is conclusive evidence of ownership. The defendants are the registered propriety of the suit premises following a transfer. The allegations of fraud apart from being time barred cannot also defeat the title by the defendants.

The test to be applied on whether the courts should grant an order for security, the court should consider the plaintiffs prospects of success and whether the defence is bona fide. Counsel urged the court to find that the plaintiffs resides outside the jurisdiction and order security for costs.

This application was opposed Counsel for the plaintiff relied on the written submissions and urged that the 1st 2nd plaintiffs were registered proprietors of LR 12495/13 having bought the land in 1987.

They charged the property to ICDC after securing a loan. In 1998 they sought a loan from the 1st defendant after which they deposited the title as the security for the loan. In 2008 the 1st defendant introduced the 3rd defendant as a purchaser of land to Agness Arupe Lokenyi who was a servant of the plaintiff left to look after the premises. On 15th September 2008 the 1st defendant entered into an agreement for sale with the 3rd defendant and declared a trust over the suit premises. The plaintiffs claim that a claim for land can be commenced after 12 years. The application for costs was also faulted on the grounds that the affidavit did not set out the grounds of the defence. The plaintiffs' claim that they were not aware of **HCCC 32 OF 1998 and ELC NO.581 OF 2008**. In any event the certificate of taxation of the pleadings in those suits are not annexed. The plaintiff have been able to show they have a prima facie case and the court should discourage out of pockets litigation. The mere facts that the plaintiffs resides in America does not mean they are not able to pay cost. They have annexed in their replying affidavit documents to show they own land in Sagana. The allegations of forgery are not controverted and the provisions of the Registered Titles Act cannot be used to perpetuate a fraud. The sum sought for security of costs is merely speculated because the plaintiff are merely seeking for the recovery of land against all the persons names in the register because there are likely to be affected by the orders therefore they need to be enjoined in these proceedings. The sum sought by the applicant in the three application are oppressive. Counsel urged the court to exercise its discretions and decline to grant the orders.

Under order 25 of the Civil Procedure Rules the court may order the security for costs be paid by the plaintiff the test that has been applied is whether the defence is bona fide and whether the plaintiffs reside outside the jurisdiction. It was argued that the claim by the plaintiff based on fraud is barred by the Limitations of Actions Act, there are also averments that the plaintiff transferred the suit premises 10 years ago. It has subsequently been transferred to the other defendants who are innocent purchasers for value. It is also claimed there was another suit **Nakuru HCCC NO. 32 OF 1998** between the plaintiffs and the 1st defendant over the same suit premises. The plaintiffs resides in the United State of America. I find there is reasonable cause for the defendant to seek the security of costs in the event that the plaintiffs suit is dismissed or the suit is found in favour of the defendants. However, the costs sought is on the higher side since the four chamber summons were argued together I will order that the plaintiffs do deposit a sum of Ksh.1 million as security for costs for the 3rd,4th to 13th and 16th defendants. The said sum to be deposited in court within 30 days. In default, the defendants would be at liberty to move the court to dismiss the suit. The applicants will also have the costs of this application.

RULING READ AND SIGNED ON 13TH NOVEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE